U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

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Date: FEB 19 1999

In re: IMAD SALIH HAMAD

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Noel J. Saleh, Esquire

ON BEHALF OF SERVICE: Scott M. Rosen
Appellate Counsel

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] -
In the United States in violation of law

APPLICATION: Adjustment of status

In a decision dated October 10, 1997, the Immigration Judge on remand from the Board granted the respondent adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The Immigration and Naturalization Service filed a motion to reconsider, which the Immigration Judge denied on October 30, 1997. The Immigration and Naturalization Service appealed both the decision and the denial of the motion. The Service also requested a remand to take additional evidence. The appeals will be dismissed; the motion will be denied.

A. FACTS AND PROCEDURAL HISTORY

The respondent is a 37-year-old native of Lebanon of Palestinian descent. He claims to be stateless. He was admitted to the United States as a nonimmigrant student on November 15, 1980. He married a United States citizen on December 31, 1982. Her visa petition was approved, but his application for permanent resident status was denied by the district director on October 31, 1985, because the district director found him inadmissible under sections 212(a)(19) and (27), of the Act, 8 U.S.C. §§ 1182(a)(19) and (27), and as a matter of discretion (Tr. April 1989 at 49 and Exh. 8). He and his wife were divorced on September 16, 1987. He is presently married to a United States citizen, whom he married on July 3, 1991. At the time of the hearing he had two United States citizen children, who are 3 and 4 years old. He now has another United States citizen child. He has worked for the Arab-American & Chaldean Council as a translator and social case worker. He previously worked for the State of Michigan. He was placed in deportation proceedings by the issuance of an Order to Show Cause on November 9, 1988. On April 25, 1989, he was found deportable under section 241(a)(2) of the

Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2), for having overstayed his visa; his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Act, and for suspension of deportation under 244(a) of the Act, 8 U.S.C. §§ 1182(a), 1253(h) and 1254(a), were denied, but he was granted voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). The respondent appealed. The proceedings were administratively closed on April 15, 1991, to allow the respondent to apply for temporary protected status for nationals of Lebanon. Temporary protected status for nationals of Lebanon terminated on April 13, 1993. On May 14, 1993, the Board reinstated the appeal, vacated the order of April 15, 1991, and dismissed the appeal as untimely.

On March 15, 1994, the respondent filed a motion to reopen to apply for adjustment of status with the Board stating that his wife's visa petition on his behalf had been approved. The visa petition was approved on March 18, 1993. On January 13, 1995, the Board found it lacked jurisdiction over the motion and remanded the record to the Immigration Judge, for consideration of the motion to reopen to apply for adjustment of status. On June 13, 1995, the Immigration Judge denied the motion for failure of the respondent to properly support the motion or to show he merited reopening in discretion. The respondent appealed. The Board dismissed the appeal on February 16, 1996, for failure of the respondent to establish prima facie eligibility for adjustment of status. The respondent filed a motion to reconsider on April 3, 1996.[1] The Board denied the motion to reconsider, but treating the motion as a motion to reopen, reopened the proceedings on February 13, 1997, and remanded to the Immigration Court, where he was granted adjustment of status. The Service appealed.

The respondent originally was placed in proceedings in 1988. At the 1989 hearing he admitted that he was a member of the General Union of Palestinian Students (GUPS), the International Student Association and the Organization of Arabic Students until he left school in June 1988 (Tr. 1989 at 18-22). He was a national board member for GUPS in 1985-86. He became a member of the Association of Palestinian Students for Return in October 1987 and was a national officer of that organization. He estimated he had given more than 50 speeches in support of Palestinian rights in Lebanon (Tr. 1989 at 26). In 1982 the respondent was arrested at a demonstration held at the League of Arab States Offices in San Francisco, California. The demonstration was occasioned by the Israeli invasion of Lebanon. He was charged with assault of a League employee, but the charges were dismissed. The Service submitted at the first hearing a 1985 FBI report supported by photographs of the respondent at a Palestinian support function held on February 24, 1985, to raise funds for the Popular Front for the Liberation of Palestine (PFLP), and alleged the respondent associated with and was a member of the PFLP (Exh. 9, April 1989). The respondent stated at the hearing that the GUPS was affiliated with the Palestine Liberation Organization (PLO), but denied he was a member of or had assisted the PFLP. His testimony in 1989 does not establish that he knowingly raised funds for the PFLP. (1989 Tr. at 112, 120-28). The Immigration Judge in his decision made no mention of his alleged affiliation with a terrorist organization.

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[1] The respondent had previously been granted extensions of voluntary departure. On October 30, 1996, the Service ordered him to report for deportation on November 18, 1996, but subsequently granted what appears to be the last extension of voluntary departure to December 1996.

At the hearing in 1997, the respondent admitted that he had been politically active in the Palestinian and Arab community both during school and afterwards. He belongs and has belonged to a number of social, cultural and business organizations among which are the Committee for a Democratic Palestine, the Arab Community Center for Economic and Social Services (Access), the American-Arab Anti-Discrimination Committee and the Arab American Institute (1997 Tr. at 72-75). He agreed that some of the functions he attended involved raising money. He maintained that he donated money only for humanitarian aid to generally recognized legal organizations, but that he was not in charge of the distribution of money and could not be sure every dollar was used only for the intended purpose. He stated that he was against terrorism, but that he agreed with certain of the policies of the PFLP (1997 Tr. at 74, 79, 111-113).

B. POSITIONS OF THE PARTIES

The Service requests that the respondent's application for adjustment of status be denied, as he is statutorily ineligible, and also as a matter of discretion. According to the Service, the respondent is associated with the Popular Front for the Liberation of Palestine, a terrorist organization. The respondent allegedly solicited and raised funds for the PFLP. The Service maintains he is a threat to national security and presented classified information ex parte to the Immigration Judge in camera in support of this assertion. The Service in its motion for reconsideration points out that on October 8, 1997, the Secretary of State officially named the PFLP as a terrorist organization. Also, according to the Service, the respondent is barred from adjustment of status under section 242B of the Act. [2]

The Service, in its appeal, argues that the Immigration Judge erred. It first argues that the respondent is barred from the requested relief by section 242B(e) of the Act, because after receiving oral and written notification of the consequences of remaining in the United States, he did not depart. The Service relies on the testimony of the respondent that his attorney discussed with him the consequences of failing to depart in accordance with a grant of voluntary departure. It further maintains that the evidence shows that the respondent is associated with a terrorist organization and that he is a threat to national security. Accordingly, the Service states, the respondent is inadmissible under section 212(a)(3)(B)(i)(I), 8 U.S.C. § 1182(a)(3)(B)(i)(I),[3] as one who has "engaged" in terrorist activity, and he should be denied relief in discretion. It

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[2] Section 242B was stricken by § 308(b) of the Illegal Immigration Reform and Immigrant Responsibility Act, Division C of Pub. L. 104-208, 110 Stat. 3009-546. The provisions were incorporated into section 237 of the Act, which applies to proceedings commenced on or after April 1, 1997.

[3] The statute currently reads: "(B) TERRORIST ACTIVITIES-- (i) IN GENERAL.--Any alien who-- (I) has engaged in a terrorist activity . . . . . is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(I). See also 8 U.S.C. § 1182(a)(3)(iii) for a definition of "engaged."

argues that the use of ex parte in camera evidence is constitutional and authorized by the statute. Jay v. Boyd, 351 U.S. 345 (1956). On appeal, in support of the motion, it submitted a partially declassified document, which it submits establishes that the respondent is inadmissible because he is associated with a terrorist organization.[4]

The respondent claims not only that his due process rights have been violated, but that denial of relief on the basis of ex parte information would violate his First Amendment rights. The respondent argues that use of in camera ex parte information violates his constitutional due process rights. He also maintains that he cannot be denied relief on the basis of the exercise of his First Amendment rights unless an intent to further illegal acts is shown by the Service. American-Arab Anti-Discrimination Committee v. Reno (ADC), 70 F.3d 105 (9th Cir. 1995); see American- Arab Anti-Discrimination Committee v. Reno, 119 F.3d 1367 (9th Cir. 199), reh. denied, 132 F.3d 531 (9th Cir.), cert. granted, ___U.S. ___, 118 S.Ct. 2059 (1998). Moreover, he maintains, the information was not properly classified. Matter of Tahsir, 16 I&N Dec. 56 (BIA 1976). He asserts that the Immigration Judge correctly found him eligible and exercised his discretion to grant adjustment of status. He denies that he is barred from relief by section 242B of the Act because he did not receive the notice required and the Board in its decision granting reopening already decided this issue.

C. IMMIGRATION JUDGE'S DECISION

There is no dispute in this case that the respondent is deportable, as charged. The previous Immigration Judge found that the respondent is deportable by clear, unequivocal and convincing evidence. Woodby v. INS, 385 U.S. 276 (1966). The respondent does not challenge that finding. The issue before us is whether the respondent is entitled to adjustment of status. The respondent has cured the deficiencies in his original application and has established that he is the beneficiary of an approved visa petition filed by his United States citizen wife. The Immigration Judge held a hearing at which the respondent and his wife testified. Other witnesses include, his supervisor at the Family Independence Agency (Department of Social Services), a neighbor, and a close friend. Despite some reservations, the Immigration Judge found that he was authorized to consider the in camera evidence, and such evidence was presented to him in chambers by an FBI agent. No record was made of the remarks or testimony of the agent, if any. The Immigration Judge, nevertheless, found that the respondent was eligible for adjustment of status and granted adjustment in discretion.

D. DISCUSSION

1. Statutory Bar to Relief

We need not consider whether the respondent is barred from relief by his failure to depart despite receiving temporary protected status and extended voluntary departure, for we find he

[4] We have not considered the additional submissions on behalf of the respondent because they were not in support of a motion.

was not given the oral notice required by the Act. Oral notices were not required in 1989 at the time of the initial hearing when he was granted voluntary departure. We find that the Act contemplates official notice by an officer of the United States government. We do not consider an oral communication by the respondent's attorney to meet the requirements of the Act for formal notice of the consequences of failure to depart in a timely manner. Therefore, the respondent is not barred from eligibility for relief under section 245 of the Act by section 242(B) of the Act. See Lahmidi v. INS, 149 F.3d 1011, 1015 (9th Cir. 1998)(242B(c) and (e) sanctions inapplicable absent compliance with procedural protections of section 242B).

2. Evidence

The respondent challenges the use of ex parte and in camera evidence. The short answer to this challenge is that the regulations provides for such evidence and the Immigration Judge properly considered it. 8 C.F.R. §§ 103.2(b)(16)(iv), 236.3(c)(4), 240.49(a);see also 8 U.S.C. § 240(a)(4)(B) of the Act. The Commissioner of the Immigration and Naturalization Service on September 3, 1997, determined that the evidence is relevant and properly classified under Executive Order 123958 (60 Fed. Reg. 19825, April 17, 1995). Although the issues of due process and First Amendment rights are important issues, the constitutional challenge to such evidence and the procedures by which it was considered are beyond our jurisdiction. ADC v. Reno, supra. The Board cannot rule upon the constitutionality of the Act and the regulations. Matter of C-, 20 I&N Dec. 529, 532 (BIA 1992)(and cases cited);Matter of Hernandez-Puente, 20 I&N Dec. 335, 339 (BIA 1991); Matter of Fede, 20 I&N Dec. 25, 30 (BIA 1989); Matter of Valdovinos, 18 I&N Dec. 343 (BIA 1982); Matter of Cenatice, 16 I&N Dec. 162 (BIA 1977); Matter of L-, 4 I&N Dec. 556 (BIA 1951). Furthermore, we need not consider whether the respondent was given an adequate summary of the ex parte evidence. The respondent cannot show prejudice where the Immigration Judge found in his favor. The respondent also argues that the Board should reach its decision without considering this evidence. We would be unable to review fully the Immigration Judge's decision without at least considering the evidence presented to him below. In addition, the Service has requested a remand for consideration of testimony by the FBI agent and this motion to remand depends on the evidence presented to the Immigration Judge.

We also note that it is imperative on occasion that in camera ex parte evidence be submitted in national security cases. The nature and source of national security information must be protected or the government would not be able to produce such evidence in the very cases where it is most important. If a respondent is a suspected national security threat, the very existence of certain kinds of evidence should be concealed from the enemies of our government. The courts rightly have expressed great concern about the use of such evidence and have enforced restrictions on its use. Abourezk v. Reagan, 785 F.2d 1043 (D.C.Cir. 1986), aff'd sub nom Reagan v. Abourezk, 484 U.S. 1 (1987). However, the evidence presented here meets the requirements of the regulations and must necessarily be considered.

D. CONCLUSION

After considering the record in its entirety, including the ex parte in camera evidence, we agree with the Immigration Judge, that the respondent should be granted adjustment of status. The respondent is a responsible member of his community, who has worked for the State of Michigan, Department of Social Services, as an interpreter and case worker assisting others in need of help. He was employed in a similar capacity with a non-governmental organization. He has a United States citizen wife, two United States citizen daughters and a United States citizen son. His wife, who was a medical assistant, has been receiving medical treatment as the result of an automobile accident, and has not been able to be employed. He has only a single arrest and no convictions. The country to which he must return to apply for a visa is still politically unstable. He has filed motions and applications over a period of time in an effort to remain in the United States, but none of them can be characterized as frivolous and much of his time here has been sanctioned.

On the other side, the Service maintains that he is a member or supporter of a terrorist organization. The respondent, could well be denied relief, if the Service's assertions of association with a terrorist organization were proven to be correct. Relief could not only be denied in discretion, but he would be inadmissible. However, we find that the association with the Popular Front for the Liberation of Palestine is unproven. The evidence presented is vague, lacking in specificity and uncorroborated. Hearsay evidence is admissible in deportation proceedings, but it is not by itself sufficient to overcome the respondent's denial of the alleged association. The FBI report from the original hearing shows that the respondent participated in a demonstration in 1982 and he assisted at a fund-raising dinner in 1985. These activities do not associate him with any particular organization. Nor does his testimony that he participated in fund-raising events for several organizations, some of which were sympathetic to certain elements of the PFLP program, and that he could not be certain exactly what happened to every donation, constitute an admission of fund raising for the benefit of the PFLP. The classified information provided in camera may arouse suspicion, but would require much greater detail to convince the members of this Board that the respondent is in any way a supporter of a terrorist organization. The two Immigration Judges who have ruled on the respondent's applications have not found the evidence presented by the Service to be convincing in this regard. It is also of some significance that the FBI terminated its own investigation of the respondent some time ago. The motion to reconsider was based on the Secretary of State's designation of the PFLP as a terrorist organization. The status of the PFLP as a terrorist organization was never in dispute in these proceedings; therefore, the designation by the Secretary of State does not necessitate reconsideration of the Immigration Judge's decision in light of the lack of evidence that the respondent committed an act of terrorist activity or knowingly afforded material support to any individual, organization or government in conducting a terrorist activity, including the soliciting of funds or other things of value. See 8 U.S.C. 1182(a)(4)(B)(iii).

E. REMAND

The Service has requested a remand for the taking of further evidence. A motion to remand must meet the requirements of a motion to reopen, especially that the remand be for the presentation of new and previously unavailable evidence. The Board does not remand for the Service to provide evidence that it should have provided in the first place. If the Service had an objection to the procedures below it should have brought its objection to the attention of the Immigraton Judge. Moreover, there is no indication that any additional evidence would support the Service position. We have not been given an offer of proof and the Immigration Judge who spoke with the FBI agent did not find in the Service's favor.

ORDER: The appeals from the decisions of the Immigration Judge are dismissed; the motion to remand is denied.

FOR THE BOARD